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No. 90-1412

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ALABAMA HIGHWAY DEPARTMENT,
PETITIONER

*v.*

SHIRLEY ANN BOONE, ADMINISTRATRIX OF THE
ESTATE OF VERNON DALE BOONE, JR., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether 23 U.S.C. 409, which provides that documents or data compiled in connection with federally funded highway safety programs "shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages" arising out of a highway accident, bars discovery of such documents and data in an action for damages.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

### STATEMENT

1. In 1989, 45,555 persons died in traffic accidents in the United States. Despite continuing safety improvements, traffic accidents remain the leading cause of death in the United States for persons less than 38 years old. In addition, traffic accidents result in more permanent injuries than any other type of accident. In 1989, more than 3.6 million persons were injured in traffic accidents in the United States. United States Dep't of Transportation, *The 1991 An-*

*nual Report on Highway Safety Improvement Programs*, at II-1 (Apr. 1991) [hereinafter *1991 Annual Report*].

The Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282 (codified as amended at 23 U.S.C. 101 *et seq.*), established federal programs to reduce the number and severity of traffic accidents by funding improvements to hazardous highway locations. Under the Rail-Highway Crossings Program (23 U.S.C. 130), the federal government provides funds to States and local governments to reduce or eliminate hazards at railroad-highway crossings. Since 1974, the Rail-Highway Crossings Program has funded more than 25,300 projects, "primarily for the installation of signs and markings, flashing light signals, automatic gates, and surface improvements." *1991 Annual Report*, at IV-3. As a result of the program, "[f]atal, nonfatal injury, and combined fatal-plus-nonfatal injury accident rates have been reduced by 88, 62, and 66 percent, respectively." *Id.* at IV-5. The Department of Transportation (DOT) estimates that the program has saved over 6,400 lives and prevented 26,500 nonfatal injuries. *Ibid.*

A second federal program, the Hazard Elimination Program (23 U.S.C. 152), provides funds for safety improvements on public highways. Since 1974, the Hazard Elimination Program has provided funds for more than 30,000 safety improvement projects, such as "improving traffic signals, improving traffic channelization, installing guardrail and median barriers, widening the traveled-way and/or shoulders, improving pavement skid resistance, and placing or upgrading pavement markings." *1991 Annual Report*, at IV-3. The program "has provided * * * reductions

in * * * fatal, nonfatal injury, and combined fatal-plus-nonfatal injury accident rates * * * [of] 48, 24, and 25 percent, respectively." *Id.* at IV-5. DOT estimates that the program has prevented over 19,000 deaths and 520,000 nonfatal injuries. *Ibid.*

As an essential part of these federally financed safety programs, the States are required to compile data identifying and evaluating potential accident sites and hazardous highway conditions. Under the Rail-Highway Crossings Program, each State is required to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. 130(d). Under the Hazard Elimination Program, each State is required to "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement." 23 U.S.C. 152(a).[1]

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[1] In addition, 23 U.S.C. 144 establishes a program to provide federal funds to replace or rehabilitate highway bridges that are "significantly important" and "unsafe because of structural deficiencies, physical deterioration, or functional obsolescence." 23 U.S.C. 144(a). Under this program, the Secretary of Transportation, in consultation with the States, inventories bridges within the scope of the program, classifies them "according to serviceability, safety, and essentiality for public use," and assigns each bridge a priority for replacement or rehabilitation. 23 U.S.C. 144(b)(2).

In the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 132, 101 Stat. 170, Congress enacted a comprehensive prohibition against the use in tort litigation of documents and data compiled in connection with federal highway safety programs. Section 132 of the Act provides, in part:

> PROHIBITION AGAINST DISCLOSURE AND ADMISSION AS EVIDENCE OF STATE REPORTS AND SURVEYS.
>
> * * * * *
>
> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. 409.

2. On August 28, 1988, a train collided with a tractor trailer truck at a railway-highway grade crossing in Leeds, Alabama. The driver of the truck was killed. Respondents brought a wrongful death action in state court against the railroad and the City of Leeds.

In February 1990, respondents subpoenaed petitioner's entire file on the grade crossing where the accident occurred. Pet. App. A22-A23. Petitioner agreed to produce certain documents in its file that were not compiled for the purpose of identifying, evaluating, or planning safety improvements, but objected to producing other documents in the file on the ground that they were protected by 23 U.S.C. 409. Pet. App. A24-A25.

The state trial court granted respondents' motion to compel production of the withheld documents. Pet. App. A3. The court interpreted Section 409 as "a bar as to admissibility and/or consideration by any court, tribunal or body which is empowered to 'consider' evidence and law, in arriving at a finding," but not "as a bar to[] the discoverability only of materials the subject of said United States Code Section." Pet. App. A3.

3. The Supreme Court of Alabama denied a petition for a writ of mandamus. Pet. App. A1-A2. The court ordered petitioner to produce the subpoenaed documents to the trial court in camera, "so that the trial court can determine which of the records, if any, are germane to any matters upon which the plaintiffs might pursue further discovery of evidence that may be admissible at trial." *Id.* at A1.

Three justices dissented. Pet. App. A2. The dissenting justices concluded that Section 409 "is a complete bar to the admissibility or discovery" of documents or data within its scope. *Ibid.* They reasoned that this result "is mandated by the language of the statute itself," as well as "the purpose behind 23 U.S.C. § 409." *Ibid.*

Respondents' wrongful death action has been stayed pending resolution of the discovery dispute at issue in this case. See Pet. 3.

## DISCUSSION

The decision of the Alabama courts in this case is inconsistent with the language, legislative history, and purpose of 23 U.S.C. 409. Section 409 broadly prohibits any consideration of documents and data compiled in connection with federal highway safety programs in actions for damages. That prohibition extends to a party's consideration of materials obtained through discovery as well as to a factfinder's consideration of materials admitted into evidence at trial. If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, States and private parties will likely be deterred from compiling complete and accurate information about such hazards. As a result, federal highway safety programs—which depend on information about safety problems supplied by the States and private entities such as railroads—will be jeopardized. In light of the importance of the question presented in this case to federal programs intended to promote highway safety, we believe that it is appropriate for the Court to grant the petition for certiorari.

1. Statutory interpretation begins with the language of the statute itself. *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991). Where the language of the statute is clear, "the sole function of the courts is to enforce it according to its terms." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). The plain language of 23 U.S.C. 409 provides not only that covered "reports, surveys, schedules, lists, or data * * * shall not be admitted into evidence in Federal or State court," but also

that they shall not be "considered for other purposes in any action for damages arising from any occurrence at a location mentioned in such reports, surveys, schedules, lists, or data." 23 U.S.C. 409. By its plain terms, this language prohibits *any* consideration of covered materials for *any* purpose, including consideration by a party who obtains such materials through discovery.

Respondents contend (Br. in Opp. 4) that a party who obtains covered materials in discovery does not "consider" such materials. That simply is not so. To "consider" is "to reflect on" or to "think about with a degree of care or caution." *Webster's Third New International Dictionary* 483 (1986). Indeed, " 'consider' often indicates little more than *think about*," although "[i]t may occasionally suggest somewhat more conscious direction of thought, somewhat greater depth and scope, and somewhat greater purposefulness." *Ibid.* Thus, Section 409 accurately describes what a party to a lawsuit does with materials obtained in discovery—it considers the materials and their possible bearing on the issues in litigation.

Respondents nevertheless assert (Br. in Opp. 4) that the statutory phrase "or considered for other purposes," read in context, must "refer[] to a trier of fact's consideration of the enumerated documents" rather than consideration of those documents by a party to the lawsuit. This reading of the statutory language is untenable. It is a basic principle of evidence that "[t]he fact issues at the trial should be decided upon the facts 'in the record,' i.e., facts officially introduced in accordance with the rules of practice, and facts which the court may judicially notice." E. Cleary, *et al.*, *McCormick on Evidence* § 51, at 122 n.1 (3d ed. 1984). Section 409's requirement that materials within its scope "not be admitted into evi-

dence" is sufficient to prevent such materials from being officially introduced, and facts contained in Section 409 documents would rarely if ever be appropriate for judicial notice. Thus, the purpose respondents would assign to the statute is fully met by the language specifying that covered documents and data "shall not be admitted into evidence in Federal or State court." 23 U.S.C. 409. But the statute does not stop there. It goes on to provide that covered materials may not be "considered for other purposes." 23 U.S.C. 409. Respondents' reading would render the phrase "or considered for other purposes" surplusage, contrary to the rule that courts "are obliged to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Nor is there any basis for the suggestion that the "or considered for other purposes" language refers to limited or specialized uses of Section 409 materials at trial, such as to impeach a witness. See *Martinolich* v. *Southern Pac. Transp. Co.*, 532 So. 2d 435, 439 (La. Ct. App. 1988), writ denied, 535 So. 2d 745 (La.), cert. denied, 490 U.S. 1109 (1989). To be sure, evidence may be admitted for some purposes (such as impeachment) but not for other purposes. See, *e.g.*, Fed. R. Evid. 105. But Section 409 expressly prohibits the admission of documents and data within its scope for *any* purpose, limited or otherwise.[2]

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[2] Respondents contend (Br. in Opp. 7-8) that 23 U.S.C. 409 is analogous to 49 U.S.C. App. 1441(e), which provides:

> No part of any report or reports of the National Transportation Safety Board [NTSB] relating to any accident or the investigation thereof, shall be admitted as evidence

In short, the plain language of Section 409 broadly prohibits any consideration of materials generated in connection with federally funded highway safety programs in actions for damages. That prohibition applies to a party's consideration of documents obtained in discovery as well as to a factfinder's consideration of documents admitted into evidence.[3]

2. Although there is no occasion to consult the legislative history when the language of the statute is plain, see *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. at 1163, the legislative history of Section 409 reinforces the conclusion that Congress did not intend to allow discovery of documents and data compiled in connection with federal highway safety programs.

The forerunner of Section 409 was a 1986 DOT recommendation that Congress amend Title 23 to provide that documents or data compiled in connection with federal highway safety programs "shall not be required to be made available pursuant to section 552 of title 5, United States Code, nor shall they be

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or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

Respondents' contention is incorrect. The NTSB's aviation accident reports are public documents. 49 U.S.C. App. 1441(a)(4); 49 C.F.R. 801.35. Thus, no question of their discoverability arises.

[3] Respondents note (Br. in Opp. 3-4) that "[b]efore Congress can intrude upon an area traditionally occupied by the states, its intent to preempt must be clear," and that therefore Section 409 "must be construed restrictively." Section 409, however, regulates the use of materials generated under federal programs—not "an area traditionally occupied by the states"—and in any event satisfies any clear statement requirement by expressly applying "in Federal or State court." Br. in Opp. 3; 23 U.S.C. 409.

admitted into evidence, or considered for other purposes, in any action for damages arising from any matter mentioned or addressed in such [documents] or data." DOT Draft Bill, *Surface Transportation Reauthorization Act of 1986*, § 130, at 55-56 (Feb. 5, 1986). The DOT's 1986 proposal, in turn, was based on similar DOT proposals prompted by concern that "highway departments are reluctant to [identify and prioritize roadway hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability." Memorandum from Marshall Jacks, Jr., Associate Administrator for Safety, Traffic Engineering, and Motor Carriers, to D.L. Ivers, Chief Counsel, Federal Highway Administration (May 4, 1983) (*reprinted at* Pet. App. A57-A58). DOT's section-by-section analysis of its 1986 proposal explained that it would require that covered materials not be "admitted into evidence *or used* in any action for damages." DOT Draft Bill, Section-By-Section Analysis at 31-32 (emphasis added). DOT thus understood the phrase "considered for other purposes" to be a broad prohibition against any use of covered materials in tort actions. Moreover, the fact that DOT proposed to prohibit release of covered materials under FOIA clearly demonstrates that the prohibition on "use" in litigation encompassed discovery.[4]

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[4] As ultimately enacted into law, Section 409 does not refer expressly to the Freedom of Information Act, 5 U.S.C. 552. Congress may have concluded that express reference to FOIA was unnecessary because Section 409 applies "[n]otwithstanding any other provision of law," 23 U.S.C. 409, and FOIA does not apply to matters that are "specifically exempted from disclosure by statute." Exemption 3, 5 U.S.C. 552(b)(3). In addition, disclosure of materials covered by Section 409 appears to be precluded by FOIA's Exemption 4

The House version of Section 409 provided that "[n]otwithstanding any other provision of law, no report, list, schedule, or survey prepared by or for a State pursuant to section 152 of title 23, United States Code, or section 203 of the Highway Safety Act of 1973 shall be admitted as evidence or used in any suit or action for damages arising out of any matter referred to in such report, list, schedule, or survey." H.R. 2, 100th Cong., 1st Sess. § 207 (1987).[5] The Senate version of Section 409, which is substantially similar to the version enacted into law, included the phrase "considered for other purposes" from the DOT's 1986 proposal. S. 387, 100th Cong., 1st Sess. § 124 (1987). The Senate Report's analysis of the provision, which is captioned "Prohibition Against Disclosure and Admission As Evidence of State Reports and Surveys," explains that no covered material "shall be required to be admitted

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(which exempts "commercial or financial information obtained from a person and privileged or confidential") and Exemption 5 (which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"). 5 U.S.C. 552(b)(4) and (5). In any event, most documents and data within the scope of Section 409 are in the custody of state agencies rather than the federal government.

[5] There was no House Report accompanying H.R. 2. The House Report cited by petitioner (Pet. 12) describes H.R. 3129, 99th Cong., 1st Sess. (1985), passed by the House in 1986, which provided that covered materials shall not be "admitted into evidence or used in any suit or action for damages." The House Report that accompanied H.R. 3129 explained that the purpose of the provision "is to encourage greater accuracy and completeness * * * by preventing [the materials] from being used in any judicial proceeding, thereby improving their quality as a basis for programming." H.R. Rep. No. 665, 99th Cong., 2d Sess. 56 (1986).

into evidence or used in any action for damages arising from matters mentioned or addressed in such documents." S. Rep. No. 4, 100th Cong., 1st Sess. 27-28 (1987). Similarly, the Conference Report states that the House bill was "[s]imilar to [the] Senate Amendment," and repeats that the effect of Section 409 is to prevent covered materials from being "admitted into evidence or used in any action for damages arising from matters mentioned or addressed in such documents." H.R. Conf. Rep. No. 27, 100th Cong., 1st Sess. 172-173 (1987). Thus, Congress clearly intended to preclude any use of materials within the scope of Section 409 in actions for damages, including use by a party to the litigation who obtains Section 409 materials through discovery.

3. The Alabama courts' interpretation of Section 409 is also inconsistent with the purpose of the statute. In enacting Section 409, Congress recognized that state highway departments, as well as private entities such as railroads, are reluctant to compile detailed and accurate information about highway safety problems if there is a significant risk that the information will be used against them in actions for damages arising out of highway accidents. Cf. *United States* v. *Weber Aircraft Corp*, 465 U.S. 792, 802-803 (1984) (recognizing "a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations"). Simply barring the admission into evidence of materials gathered in the process of such evaluations, while allowing discovery of such materials, would not prevent enterprising plaintiffs from making effective use of the materials in an action for damages. As one court has observed, there is merit to the argument that "[t]he disclosure of 409 materials is merely the first step in a backdoor process that leads to the de facto admission in sum

or substance in one form or another of the information in question." *Light* v. *New York*, 149 Misc. 2d 75, 79, 560 N.Y.S.2d 962, 964 (Ct. Cl. 1990).

Indeed, the general rule is that privileged matter is not subject to discovery. See, *e.g.*, Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant."); Fed. R. Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings."). In many cases, plaintiffs may be able to replicate information obtained through discovery in an admissible form simply by using Section 409 materials as a blueprint for questioning in depositions. In other cases, plaintiffs may conduct their own studies, patterned after studies conducted by the States, to recreate Section 409 materials. The fact that respondents and other parties to lawsuits have devoted considerable effort to obtaining Section 409 material indicates that the material is quite useful in litigation, even if not itself admissible.

4. The question presented in this case is of considerable importance to the success of federal highway safety programs. Congress enacted Section 409 because it concluded that States and private entities such as railroads were reluctant to provide complete and accurate information about highway safety problems that is essential to federally funded highway safety programs.

The question presented is not only important, but is certain to recur frequently. In 1989, there were 682 fatal accidents, and 2,600 nonfatal accidents, involving motor vehicles at rail-highway crossings alone. *See 1991 Annual Report*, at II-13 to II-14. In the relatively short time since this Court declined to consider this issue in *Martinolich* v. *Southern Pac. Transp. Co.*, 532 So. 2d 435 (La. Ct. App. 1988), writ denied, 535 So. 2d 745 (La.), cert. denied, 490

U.S. 1109 (1989), it has been addressed in at least three published decisions in addition to this case. See *Hagerty* v. *Southern Ry.*, 133 F.R.D. 34 (E.D. Mo. 1990); *Light* v. *New York*, 149 Misc. 2d 75, 560 N.Y.S. 2d 962 (Ct. Cl. 1990); *Indiana Dep't of Transp.* v. *Overton*, 555 N.E.2d 510 (Ind. Ct. App. 1990).

Petitioner has attached to its petition copies of five unpublished decisions—two by federal district courts and three by state trial courts—holding that Section 409 bars discovery of documents and data within its scope. See Pet. App. A35-A56. These decisions conflict with other decisions holding that Section 409 imposes no limitations on discovery. See *Hagerty* v. *Southern Ry., supra*; *Light* v. *New York, supra*; *Indiana Dep't of Transp.* v. *Overton, supra*; *Martinolich* v. *Southern Pac. Transp. Co., supra*. We recognize that there is as yet no conflict among federal courts of appeals or state courts of last resort, but the sharp conflict in the lower courts nevertheless reveals significant confusion over the application of Section 409 to discovery. In addition, several of the courts that have allowed discovery have expressed some doubt about the correctness of that result. See *Hagerty*, 133 F.R.D. at 36 (discoverability question "is far from being settled"); *Light*, 149 Misc. 2d at 79, 560 N.Y.S.2d at 964 (recognizing "facial merit" to argument that "[t]he disclosure of 409 materials is merely the first step in a backdoor process that leads to de facto admission"); *Martinolich*, 532 So. 2d at 439 ("The meaning of 'or considered for other purposes' . . . is not clear."). The confusion in the lower courts is exemplified by the conflict between the decision of the Alabama state courts in this case and a decision of the United States District Court for the Northern District of Alabama holding that Section

409 bars discovery. *See Bearden* v. *Southern Ry.*, No. CV88-PT-0005-S (July 11, 1988), *reproduced at* Pet. App. A35-A38.

This case presents a single, straightforward question of statutory interpretation. It is unlikely that additional lower court decisions will shed further light on the question presented. Moreover, we believe the decision of the Alabama courts in this case is incorrect. Because further delay will jeopardize the effectiveness of federal programs intended to promote highway safety without serving any useful purpose, we believe it is appropriate for the Court to resolve the question presented in this case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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